APPEAL NO. 93308

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was originally held in (city), Texas, on September 2, 1992, before hearing officer (hearing officer). The issue before the hearing officer was whether the claimant, who is the respondent in this case, timely disputed a doctor's finding of maximum medical improvement (MMI) and his impairment rating, pursuant to Commission rule, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The hearing officer held that the claimant timely disputed the doctor's findings, from which the carrier appealed. Because the finding of claimant's timely dispute was based upon his statement made prior to the issuance of the impairment rating, this panel reversed the hearing officer's decision and remanded for development of further evidence as to when the claimant had knowledge of the doctor's impairment rating. Texas Workers' Compensation Commission Appeal No. 92542, decided November 30, 1992.

Following a hearing on remand on March 10, 1993, the hearing officer determined that the claimant did not have knowledge of the impairment rating until on or about May 20, 1992, and that he disputed such rating within 90 days. The appellant, hereinafter carrier, appeals this determination. The claimant did not file a response.

DECISION

We affirm the decision and order of the hearing officer.

At the outset, we state our agreement with the carrier that its April 20th request for review, which was erroneously sent to the wrong entity and was not received by the carrier's designated Austin representative until April 15th, was timely.

The facts of this case are set out in Appeal No. 92542, *supra*, and will not be repeated in detail here. Basically, the claimant saw (Dr. R) on February 6, 1992, pursuant to a referral from his treating doctor. The same day claimant complained to carrier's adjuster about the way in which Dr. R examined him. Claimant testified that the adjuster, (JB), responded that he needed to get an impairment rating. Meanwhile, Dr. R completed a Report of Medical Evaluation (Form TWCC-69) on February 6th which certified MMI and gave claimant a five percent impairment rating. On February 25th, the carrier filed a Form TWCC-21 (Payment of Compensation or Notice of Refused/Disputed Claim) and began paying impairment income benefits (IIBs). The claimant testified that he first realized Dr. R had assigned him an impairment rating about four months after the examination, when he received a notice indicating his benefits had ended and he called JB for an explanation. Because a second TWCC-21, dated May 20, 1992, indicates IIBs were paid claimant until May 22, 1992, more than 90 days had elapsed since Dr. R issued his impairment rating.

On rehearing, the carrier introduced an affidavit from JB which stated that on or about February 25, 1992, he sent an A-2/A-3 (referring to the termination and reduction/resumption portions of the Form TWCC-21) to claimant, mailed first class, to the same address to which claimant's benefits checks were mailed. He further attested that he never received this piece of mail back, and stated, "[t]he 5% impairment rating was noted under the `Remarks' section of this TWCC-21. The first attempt [claimant] made to dispute the impairment rating was a phone call on 6/8/92." The claimant testified that he had moved from his address, but he did not think he moved during the period of time at issue in this case. He further stated that he did not fail to receive his benefit checks.

The claimant also testified that he was aware of a 15 percent impairment rating given by (Dr. C), a doctor to whom he was subsequently referred. He said he believed he had found out about this impairment rating in a letter from the doctor, and that he called JB thereafter and said he did not have any problem with Dr. C.

The hearing officer determined that Dr. R's five percent impairment rating was claimant's first impairment rating; that claimant did not have knowledge of Dr. R's impairment rating until on or about May 20, 1992; and that claimant disputed Dr. R's impairment rating within 90 days of May 20th, pursuant to the requirements of Rule 130.5(e), Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e).

The carrier on appeal questions whether claimant's testimony that he did not receive the first TWCC-21 constituted the preponderance of the credible evidence, in light of JB's affidavit and claimant's testimony that he had received all his benefit checks.

This panel has previously held that whether a first impairment rating was timely disputed is a question of fact. Texas Workers' Compensation Commission Appeal No. 93047, decided March 5, 1993. The point at which a claimant first had knowledge that an impairment rating was issued also is a question of fact. As we said in the first decision in this case, the 90 day dispute period does not necessarily run from the date the impairment rating is assigned, and indeed the Appeals Panel has on several occasions upheld a hearing officer's determination of a date on which a claimant first knew that a doctor had issued an impairment rating. *See*, e.g., Texas Workers' Compensation Commission Appeal No. 93089, decided March 18, 1993.

The evidence in this case in favor of carrier's position includes the affidavit of JB, which indicates the first TWCC-21 was mailed to claimant on or about February 25, 1992, and the fact that claimant apparently received all benefit checks at the address used by JB. Claimant testified, to the contrary, that he was first apprised that Dr. R had assigned him an impairment rating on or about May 20th when he received the second TWCC-21 and his final check. The hearing officer, as fact finder, was entitled to give more credit to claimant's testimony, perhaps in light of the fact that claimant also testified he never knew

Dr. R was going to give him an impairment rating and, in complaining about Dr. R to JB, the latter told claimant to contact his treating doctor and they would get an impairment rating done (inferentially prospectively). *See also* Appeal No. 93047, *supra*, where we indicated that evidence showing standard filing procedures had been followed by a carrier was but one piece of evidence to be considered by the trier of fact. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Article 8308-6.34(e). We will not substitute our judgment for that of the hearing officer where, as here, it is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge